UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

DARRYL ROBERTS,	)	
	)	
Plaintiff	)	
	)	
v.	)	**Civil No. 97-303-P**
	)	
STATE OF MAINE, et al.,	)	
	)	
Defendants	)	

RECOMMENDED DECISION

Plaintiff filed this *pro se* Complaint pursuant to 42 U.S.C. §1983 alleging that while housed at the Maine Correctional Center he was subjected to cruel and unusual punishment. The Court has granted Plaintiff's Application to Proceed *in forma pauperis*. Plaintiff names the State of Maine, Andrew Ketterer, the Attorney General, James Clemons, the Superintendent of the Maine Correctional Center, Martin Magnusson, the Commissioner of Corrections, and Richard McKeen, the Assistant Superintendent of the Maine Correctional Center as Defendants. Pending before this Court is Defendants' Motion for Summary Judgment, Plaintiff's Response and Defendants' Reply to Plaintiff's Response.[1]

[1] Plaintiff raises new allegations in his Response to the Motion for Summary Judgment. Plaintiff alleges that he received only limited access to the library, copier and typewriter. On this claim, Plaintiff could have filed a motion with this Court seeking additional time to file a response but did not. Having filed a response, he cannot now claim that he had inadequate access to the library, copier and typewriter. Plaintiff's also makes an allegation against Defendant Magnusson. However, an opposition to summary judgment is an inappropriate vehicle to raise new allegations.

Discussion

A. Failure to State a Claim

Plaintiff claims Defendants subjected him to cruel and unusual punishment by: (1) taking his contacts away from him for several weeks from the time he first entered prison; and (2) taking his contacts away from him when his new eyeglasses arrived. Plaintiffs' claims against the State of Maine fail because the State is not considered a "person", for the purposes of 42 U.S.C. §1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58,71 (1989). Further, Defendants Andrew Ketterer, James Clemons and Martin Magnusson are apparently named because of their supervisory roles within the Maine Correctional Center. However, there is no *respondeat superior* liability under section 1983. *Monell v. Department of Soc. Serv.*, 436 U.S. 658,691 (1978). Defendants may only be liable for their own acts or omissions. *Id.* Plaintiff's Complaint is appropriately DISMISSED against these Defendants for failure to state a claim pursuant to 28 U.S.C. 1915(e)(2).

B. Summary Judgment

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "A material fact is one which has the potential to affect the outcome of the suit under applicable law.'" *FDIC v. Anchor Properties*, 13 F.3d 27, 30 (1st Cir. 1994) (quoting *Nereida-Gonzalez v. Tirado-Delgado*, 990 F.2d 701, 703 (1st Cir. 1993)). The Court views the record on summary judgment in the light most favorable to the nonmovant. *Levy v. FDIC*, 7 F.3d 1054, 1056 (1st Cir. 1993).

Summary judgment is, however, appropriate "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Once the moving party has presented evidence of the absence of a genuine issue, the nonmoving party must respond by "placing at least one material fact in dispute." *Anchor Properties*, 13 F.3d at 30 (citing *Darr v. Muratore*, 8 F.3d 854, 859 (1st Cir. 1993)).

Plaintiff claims that Defendant McKeen subjected him to cruel and unusual punishment when prison officials first removed his contacts. Plaintiff does not dispute that Defendant had no part in removing the contacts from him. Instead, Plaintiff complains about Defendant's role in the grievance process regarding the amount of time it took for his contacts to be returned to him.

Plaintiff fails to demonstrate that Defendant McKeen subjected him to cruel and unusual punishment. Once Defendant McKeen was put on notice of Plaintiff's grievance, he contacted the facility optometrist. When the facility optometrist told Defendant that Plaintiff needed the contacts to correct his vision until the new eyeglasses arrived, Defendant promptly returned the contacts to the Plaintiff. Plaintiff fails to place material facts in dispute from which a factfinder could conclude that Defendant subjected Plaintiff to cruel and unusual punishment.

Plaintiff also claims that Defendant McKeen subjected him to cruel and unusual punishment because Defendant McKeen ordered that his contacts be taken from him. Defendant McKeen ordered that Plaintiff's contacts be removed after a facility medical contract administrator told Defendant that two optometrists said Plaintiff's new eyeglasses corrected

Plaintiff's vision and protected Plaintiff from photophobia.[2] Plaintiff claims that the eyeglasses do not protect him against photophobia and as a result, he cannot take part in outdoor activities.

Plaintiff's claim rises to the level of a constitutional violation if Defendant McKeen exhibited "'deliberate indifference to serious medical need.'" *Watson v. Caton*, 984 F.2d 537,540 (1st Cir. 1993) (quoting *Estelle v. Gamble*, 429 U.S. 97, 106 (1976)). "The Courts have consistently refused to create constitutional claims out of disagreements between prisoners and doctors about the proper course of a prisoner's medical treatment, or to conclude that simple medical malpractice rises to the level of cruel and unusual punishment." *Id.*

In this case, no deliberate indifference exists. Instead, Plaintiff merely disagrees with the diagnosis of two optometrists.[3] Disagreement with doctors about medical care is not recognized as a violation of a constitutional right. Therefore, Plaintiff's second claim against Defendant McKeen must fail.

Conclusion

Accordingly, I recommend that Plaintiff's Complaint be DISMISSED for failure to state a claim against Defendants State of Maine, Andrew Ketterer, Martin Magnusson and James Clemons. I also recommend that Defendants' Motion for Summary Judgment as to Defendant McKeen be GRANTED.

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[2] Photophobia is a condition that causes eyes to be overly sensitive to light. Often persons with photophobia need shaded glasses to screen the light from their eyes.

[3] Plaintiff states that a facility employee, a registered nurse, never contacted his personal optometrist. Rule 56(e) of the Federal Rules of Civil Procedure requires that a party, "set forth specific facts showing that there is a genuine issue for trial." What the Plaintiff has offered the Court is a conclusion. Plaintiff fails to demonstrate any personal knowledge to support his conclusion that the facility employee did not talk to his doctor. Therefore the Court does not treat Plaintiff's assertion as raising a genuine issue of material fact.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) (1988) for which *de novo* review by the district court is sought, together with a supporting memorandum, within ten (10) days of being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

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Eugene W. Beaulieu

United States Magistrate Judge

Dated: March 23, 1998.